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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 669

BENNY LURK,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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May 1, 1961

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REPLY BRIEF FOR PETITIONER

The United States has filed a brief of 126 pages, plus two appendices, in order to demonstrate that the court below properly dismissed as frivolous petitioner's application for leave to appeal *in forma pauperis*. The sheer bulk of that brief alone, augmented as it is by an *amicus* brief on behalf of the judges of the Court of Claims, stands as mute testimony to the non-frivolous nature of that application and to the error of the denial of leave to appeal.

The major portion of the brief of the United States is addressed to the merits of one of the two issues tendered below on behalf of petitioner. That issue concerns the constitutionality of the assignment of a retired legislative court judge to preside over a criminal trial in an Article III court. Having urged below that this issue is too frivo-

lous or insubstantial to warrant review and still continuing to press that contention before this Court, the United States finally concedes (Br., p. 49) that the matter has "now become troublesome and needs resolution" and the hope is expressed "that the Court may see fit to pass directly upon the problem." And in the course of its argument, the United States asks this Court to overrule at least one[1] if not two[2] or three[3] of its decisions, which in turn derive from a decision rendered for the Court by Chief Justice Marshall in 1828.[4]

Yet the United States continues to insist that the judgment below is correct and that the petitioner has been accorded all the appellate review rights to which he was entitled.

I.

The Impropriety of the Denial of Leave to Appeal.

The United States again misstates the nature of the proceedings below and refuses to acknowledge the full sweep of the appellate review doctrines unanimously established by this Court in *Ellis* v. *United States*, 356 U.S. 674. Indeed, the procedures and principles suggested in the Government's brief are so destructive of the fair and equal treatment that must be accorded indigent defendants seeking to appeal from their convictions as to constitute a crisis in the administration of appellate criminal justice in the Court of Appeals for the District of Columbia Circuit. If those procedures and principles were

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[1] *Ex parte Bakelite Corp.*, 279 U.S. 438. See Br., pp. 97-98.

[2] *Williams* v. *United States*, 289 U.S. 553. See Br., pp. 112-114.

[3] *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693. See Br., pp. 117-121.

[4] *American Insurance Co.* v. *Canter*, 1 Pet. 511.

to be followed in the court below—and concededly any suggestions of the Solicitor General are influential—an unwarranted discrimination against indigent appellants would soon manifest itself, in addition to that already present in this case. Only this Court can bring order out of this growing chaos and restore the principles of the *Ellis* case.

At the crux of the Government's position is its insistence (Br., p. 30) that since petitioner had counsel assigned to him, a transcript prepared at Government expense, the benefit of "extended" written argument by counsel, and "adequate" consideration by a three-judge panel, he was entitled to no more. In substantiation of that conclusion, the Government proceeds to create a novel two-step procedure for indigent appellants (Br., pp. 33-35):

(1) The first step is said to occur when appointed counsel requests a transcript of the trial proceedings. At that point, the suggestion is that the decision to grant or deny the request must be made on the basis of potentialities and that the frivolousness of the issues sought to be raised must be clearly apparent from the face of the request. It is here—and here only—that the Government would recognize and apply the *Ellis* doctrine. In other words, it is the request for a transcript, not the petition for leave to appeal and supporting memoranda, which the Government says should be subjected to the *Ellis* test of frivolousness.

(2) The second step is said to be reached after the transcript has been obtained and the issues "briefed (even though preliminarily)" in the form of accompanying memoranda (Br., p. 34). Here no effort is made to apply the *Ellis* doctrine. Instead of testing the petition and memoranda in the light of frivolousness of the issues raised, the court is said to be justified in denying leave to appeal "when in its opinion the issues presented show such lack

of substance that further review would be an unnecessary consumption of the court's time" (Br., pp. 34-35). Thus would the concept of substantiality be substituted for that of frivolousness.

Petitioner submits that neither the *in forma pauperis* statute, 28 U.S.C. §1915, nor the *Ellis* decision justifies such a bifurcation of this preliminary appellate procedure. Section 1915 very plainly says that an appeal—which normally includes all steps through oral argument on the merits—shall be allowed an indigent if "taken in good faith." And the *Ellis* decision states, 356 U.S. at 674, that the applicant's good faith under that legislative provision is established "by the presentation of any issue that is not plainly frivolous." The *Ellis* decision further warns against converting this good-faith test "into a requirement of a preliminary showing of any particular degree of merit." 356 U.S. at 675. Not one syllable in the *Ellis* opinion suggests that its impact is limited to applications for trial transcripts or that the good-faith test can be converted into a requirement of substantiality or of some degree of merit once the transcript has been obtained and preliminary arguments made in light thereof. And nothing in the brief of the United States reveals any basis whatever for so limiting *Ellis* other than an apparent desire to close the appellate doors to as many indigents as possible.

Petitioner, of course, does not urge that he has a constitutional right to oral argument of his appeal, or even that oral argument is always a necessary part of an appeal. But he does insist that any determination to dismiss his appeal before reaching oral argument on the merits must be made in accordance with Section 1915 as interpreted by the *Ellis* case. And under that provision, an appeal can be cut off short of oral argument only if a similar prepaid appeal could be so dismissed under Rule 39(a)

of the Federal Rules of Criminal Procedure. Under that rule, a prepaid appeal can be dismissed only if the question raised on appeal "does not present a reviewable issue" within the jurisdiction of the appellate court. *United States* v. *Johnson*, 327 U.S. 106, 113.

Whether an issue is "reviewable" or "non-frivolous" turns not on its substantiality or merit but on its susceptibility to review by the appellate court. Many criminal appeals, both prepaid and *in forma pauperis*, ultimately turn out to be insubstantial and without merit. Yet they are not properly dismissable prior to a full-scale review on the merits if the issues they pose may fairly be considered reviewable or non-frivolous. And as long as the criminal appellant—be he indigent or wealthy—is granted the privilege of pursuing the full appellate process on the tendering of a reviewable or non-frivolous issue, he cannot be cut short on the theory that the issue is insubstantial or without merit.

Thus the Government's suggestion that this indigent petitioner's right to full appellate review may be rebuffed simply because the issues tendered on his behalf appear to be insubstantial constitutes an invidious discrimination against a pauper. A wealthy appellant, with money to purchase his own transcript, would not be subject to dismissal under Rule 39(a) for presenting a reviewable but insubstantial question. Precisely this kind of discrimination has been outlawed time and again by this Court in cases arising in state courts. *Griffin* v. *Illinois*, 351 U.S. 12; *Burns* v. *Ohio*, 360 U.S. 252; *Smith* v. *Bennett*, Nos. 174 and 177, Oct. Term, 1960 (April 17, 1961). As stated in the *Burns* case, 360 U.S. at 257-258, there is "no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants." Any contrary suggestion by the United States-

is no less obnoxious than those that have been made by certain state governments.

The practical difficulties in the way of adopting the Government's suggested two-step procedure weigh decisively against its adoption. The *Ellis* doctrine of frivolity, says the Government, should apply only to counsel's request for a transcript. But what issues can be tendered and tested by that standard when counsel is seeking a transcript in order to determine what issues are in fact present? In the instant case, for example, counsel sought a transcript (R. 10-11) because he could not otherwise determine whether there was any basis whatever for petitioner's *pro se* assertions and because counsel himself was "not convinced that the trial was conducted free of all reversible error or that there was a complete absence of plain errors going to the justness and fairness of the proceeding" (R. 10-11). The two issues later tendered on petitioner's behalf were not utilized as a basis for securing the transcript; and, indeed, the first issue subsequently presented, relating to trial references to petitioner's past criminal record, did not become fully apparent until after the transcript had been secured and examined in detail. Quite obviously, then, the *Ellis* doctrine was not applied, and could not have been applied, in determining whether to grant this request for a transcript.

In reliance on the *Ellis* doctrine, petitioner's counsel then proceeded to formulate two issues and to demonstrate their non-frivolousness. But apparently, in light of the Government's analysis, counsel wrote either too much or too little. He wrote too much in that he is now said to have "extensively" briefed these issues to the point of revealing "the insubstantiality of the claims of error or the lack of a justiciable question" (Br., p. 35). Such a comment reveals a somewhat wry sense of humor in view of the extensive

briefs filed in this Court revealing at least one issue of monumental proportions.

On the other hand, perhaps counsel did not write enough in his memoranda below; perhaps if he had filed a 126 page memorandum with the fine detail of the Government's brief in this Court the United States would concede that the issues were at least not insubstantial and merited further briefing and consideration, including oral argument before the Court of Appeals.

The short of it is that there is no ascertainable basis, under the Government's suggestion, for appointed counsel to know how much showing must be made to demonstrate the substantiality of an issue. Indeed, any standard of substantiality inevitably tends to become a standard relating to the merits of the case. And the whole thrust of Section 1915 thus tends to be shifted to a demonstration of ultimate merit in order to have an appeal allowed. But Congress has not so provided. And if petitioner is now to be tested by a retroactive application of a new double-barreled standard as formulated by the Government, serious due process issues are thereby raised. See *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 678-680.

To bring clarity to this situation, the Court may deem it appropriate to "draw upon . . . [its] supervisory power over the administration of criminal justice" in the federal courts, *Grunewald* v. *United States*, 353 U.S. 391, 424; *McNabb* v. *United States*, 318 U.S. 332, 341, to lay down "certain fundamental requirements . . . [to] be observed by the Court of Appeals," cf. *Western Pacific Railroad Case*, 345 U.S. 247, 260, in acting upon applications for leave to appeal under Section 1915.[5] Perhaps the courts

[5] It is clear that this power extends to formulating rules of procedure for courts of appeals. *Western Pacific Railroad Case*, 345 U.S. 247. In that case, although recognizing that "each Court of Appeals is vested with a wide latitude of discretion to decide

of appeals might be required to adopt a procedure whereby an indigent petitioner, or his court-appointed counsel, prepares only a general statement of the non-frivolous issues which he intends to present on the appeal, with appropriate record references, comparable to the statement of questions presented on a prepaid appeal and filed before the briefing and oral argument (see, e.g., Rule 15 of the Rules of the Court of Appeals for the District of Columbia Circuit). This would take the place of the memorandum, as required by the court below, that attempts to explain the non-frivolousness of the issues raised. The burden would then be on the Government—as it is in prepaid criminal appeals—to establish by motion and accompanying memorandum that the questions presented are frivolous and non-reviewable and that leave to appeal should therefore be denied. The petitioner should, of course, be given an opportunity to reply to the Government's contention.

Such a procedure would have manifold advantages. Most importantly, under the statutory scheme as delineated in the *Ellis* case, this procedure would provide equality in fact with the procedure in prepaid appeals. In the latter appeals, appellants are not required to file preliminary memoranda attesting to the non-frivolousness or reviewability of the issues they seek to raise; such a matter must be raised by motion by the Government or by the court *sua sponte*. See *United States* v. *Johnson*, 327 U.S. 306, 313. Furthermore, this suggested procedure would obviate a great deal of unnecessary briefing by both parties and would save the time of court and counsel. If the Government were obligated to demonstrate affirmatively that the

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for itself just how that power is to be exercised," 345 U.S. at 259, this Court prescribed certain minimum "fundamental requirements" for them in utilizing their power to sit *en banc* under 28 U.S.C. §46(c).

issues are non-reviewable, there would be fewer unreflective oppositions to *in forma pauperis* applications which only confuse the issues and dilute the meaning of the *Ellis* case.

This procedure, of course, would not eliminate in all cases briefing to the extent that has occurred in this proceeding below. But it would relieve appointed counsel of the confusing and uncertain burden of going forward with proof of the non-frivolousness or reviewability of the good-faith issues presented. Non-frivolousness is too evanescent a standard to discuss intelligently in the absence of some indication as to why the standard has not been met. The fact that memoranda of appointed counsel now frequently deal with the merits of the issues is due in large part to the inherent difficulty of dealing in a vacuum with the question of non-frivolousness.

But whatever the standards of review or the procedures to be followed in the court below, the basic fact remains that the two issues presented below on behalf of petitioner should have compelled the Court of Appeals to grant a full-scale review. The non-frivolousness of the constitutional issue is by now too obvious to require further elaboration.[6] And the more than four pages devoted by the United States (Br., pp. 40-45) to a discussion of the non-constitutional issue, relating to the trial references to

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[6] The United States continues to insist (Br., p. 45) that the constitutional issue as raised below conceded the validity of the 1958 amendatory legislation and was confined to the impact of that legislation on a retired judge of a court constitutional in nature after 1958. The issue was in no way so limited; nor was any concession made as to the validity of the 1958 legislation. As stated in counsel's memorandum below (R. 27): "The ultimate question thus is whether a designation and assignment to the court below of a judge who retired in 1952 from the Court of Customs and Patent Appeals can *constitutionally* be made so as to authorize such a judge to exercise the judicial powers of the court below." That question embraced all facets of the constitutional issues discussed herein by the United States.

petitioner's criminal record, serve only to augment the non-frivolousness and the reviewable nature of that issue. Nothing that the Government has said negates the controlling statement by this Court in *Farley* v. *United States*, 354 U.S. 521, 522, that this type of issue "cannot be characterized as frivolous."

II.

The Constitutional Incapacity of Judge Jackson.

The United States, having finally concluded (Br., p. 49) that the question as to Judge Jackson's capacity to act as the trial judge in the District Court below "has now become troublesome and needs resolution," poses three propositions in support of his right to preside over petitioner's trial:

(a) Judge Jackson was at least a *de facto* judge;

(b) Judge Jackson has had Article III status at least since the 1958 amendment to 28 U.S.C. §211; and

(c) The Court of Customs and Patent Appeals always has been an Article III court and the contrary *Bakelite* decision should be overruled.

A. *The de facto argument*

The first line of defense taken by the United States (Br., pp. 50-59) is that Judge Jackson was at least a *de facto* judge whose title to the "office" of District Judge of the District Court for the District of Columbia cannot be challenged by petitioner on appeal.

Petitioner, of course, has no quarrel with the *de facto* doctrine or with the principles of public policy which underlie it. Nor does petitioner intend to engage in a

semantic argument with the Government over whether the *office* of District Judge of the District Court of the District of Columbia is under challenge. The simple fact is that petitioner's challenge goes to Judge Jackson's *competence under the Constitution* to exercise Article III judicial power and to render judgment in a criminal case necessarily involving the exercise of such power. At stake, then, is no formal defect in his authorization or designation, nor is there any question as to his right to act—on the District Court or elsewhere—within the constitutional scope of his status as a retired legislative court judge. The critical issue is a clear constitutional one. Does the Constitution permit a retired legislative court judge to exercise Article III judicial power by assignment or otherwise?

As the United States explained to this Court only last term (Brief of the United States in *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, No. 138, O.T., 1959, pp. 27-28):

> "The 'de facto' principle, in essence, has been applied where, unlike the case here, the judge's right to office is in question, or where, also unlike this situation, there has been an attack on some formal defect in a judge's authorization to act, such as in the case of designation and assignment. The 'de facto' doctrine does not reach the situation, such as the instant case, where a judge is expressly precluded from a specific type of judicial action by legislative mandate. *Were it otherwise, judges might then exceed their constitutional and statutory authority to act with impunity*, and the legislative prohibition of provisions like Section 46(c) would be completely undermined." [Emphasis added.]

In other words, where some constitutional or statutory provision forbids a judge from participating in a particular

type of judicial action, the *de facto* doctrine is inapplicable. To borrow the words quoted by the Government in its *American-Foreign Steamship* brief (p. 27) from the Vermont Supreme Court in *Watson* v. *Payne*, 94 Vt. 299, 301:

> ". . . [W]here it is expressly declared by constitutional or statutory provision that in certain specified cases a judge shall not sit or shall not act, or shall take no part in the decision, the authorities are almost uniform to the effect that any judgment rendered by such judge in such case is *coram non judice*, and void."

See also *People* v. *Bork*, 96 N.Y. 188; *Case* v. *Hoffman*, 100 Wis. 314, 352 358.

This Court has consistently recognized the voidness of judgments rendered by those judges lacking constitutional or statutory authority to sit in a given type of case. Thus in *American Construction Co.* v. *Jacksonville Railway*, 148 U.S. 372, where an appellate judge participated contrary to statute in an appellate decision setting aside an order originally entered by him as trial judge, the Court unequivocally voided the decision and ruled (148 U.S. at 387):

> "If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error or certiorari."

And in *Frad* v. *Kelly*, 302 U.S. 312, 316, the order of a district judge was voided at the instance of a criminal defendant where the express provisions of the Probation Act negated the power of the judge to act after his designation and assignment to a particular court had terminated. Again last term, in *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, 691, in reliance on the fore-

going decisions, this Court voided an *en banc* judgment of a court of appeals in which a retired judge had participated contrary to a legislative mandate. See also *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132.

In this case the contention is that the Constitution, rather than a statute, rendered Judge Jackson, as a retired legislative court judge incompetent to sit in the instant criminal proceeding and to exercise Article III judicial power. Hence, by virtue of the foregoing authorities, the *de facto* doctrine is inapposite.

Petitioner's argument, of course, goes to something far more fundamental than the "office" of District Judge, a concept which seems to have mesmerized the United States. (See, particularly, Br., at pp. 57-59.) But even if we were to adopt the semantic nuances of the term "office" the *de facto* doctrine could not come into operation to preclude petitioner's challenge.

Under the "office" approach, there is no "office" of District Judge, for purposes of exercising Article III judicial power, which Judge Jackson could validly fill or purport to fill. The only "office" for which Judge Jackson ever was invested with power was that of a legislative court judge, capable of exercising such power on the Court of Customs and Patent Appeals and possibly on other courts by assignment where legislative powers were to be exercised. In such capacity he was "incapable of receiving" any Article III judicial power or utilizing such power in an Article III proceeding. To that extent there was no Article III "office" which Judge Jackson could fill.

Moreover, the United States Code establishes only 15 District Judges in the District Court for the District of Columbia. 28 U.S.C. §133. Judge Jackson's assignment (see petitioner's main brief, pp. 4-5) does not purport to

assign him to execute the "office" of any of those 15 judgeships by virtue of any vacancy or incapacity of an incumbent. He was assigned as a retired judge to an "office" in addition to those 15 judgeships. Presumably such an "office" was effective insofar as Judge Jackson was called upon to exercise any of the legislative powers which adhere to a hybrid court such as is here involved. But the ultimate question remains whether there was any "office" for the execution of Article III judicial power to which Judge Jackson could be assigned.

To argue, as does the United States, that Judge Jackson held the "office" of District Judge and thus became a *de facto* judge is to indulge in a "bootstrap" argument and to assume the very point in issue. If the Constitution precluded him from acting or serving in the capacity of an Article III judgeship, the additional Article III "office" which he purported to hold never came into legal existence. Such an "office" must be apart from the 15 judgeships authorized by Congress and could come into being only by virtue of the assignment statute, 28 U.S.C. §294(b). But if that statute cannot validly be applied to create an Article III "office" in the District Court for a retired legislative court judge, the "office" is non-existent in legal contemplation.

Hence the decision of this Court in *Norton* v. *Shelby County*, 118 U.S. 425, 441-442, cited with approval by the United States in its brief herein (pp. 52-53), becomes of controlling importance. There a state court had been declared to lack constitutional sanction or existence. And in answer to the contention that the members of that court were nonetheless *de facto* judges whose capacity could not be challenged, this Court said in language singularly pertinent to the contention of the United States in the instant case:

"This contention is met by the fact that there can be no officer, either *de jure* or *de facto*, if there be no office to fill. As the Act attempting to create the office of commissioner never became a law, the office never came into existence. Some persons pretended that they held the office, but the law never recognized their pretensions, . . .

". . . But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is that a legislative Act, although unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by any argument beyond this statement. An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Thus, in this case, where the Constitution forbids the legal existence of an Article III judgeship in the person of a retired legislative court judge, the office never existed *de jure* or *de facto*, and Judge Jackson became no more than an usurper to whose acts no validity can be attached. His

judgment can therefore be challenged by petitioner at any time, in any court, and in any appropriate manner.

B. *The post-1958 status of Judge Jackson*

The United States also suggests (Br., pp. 59-64) that, however legislative in nature may have been Judge Jackson's status prior to 1958, the enactment of the amendment to 28 U.S.C. §211 in 1958 certainly gave him Article III status thereafter.

The short answer is that the 1958 legislation is only prospective in nature. It does not purport to be retroactive in scope or to affect the constitutional status of any judge who had previously retired from the court.[7] The amendment was expressly premised on the fact, stemming from the *Bakelite* decision, that the court *"is now* constituted under section 211 of title 28, United States Code, and *is* classified as a legislative court." S. Rep. No. 2309, 85th Cong., 2d Sess. (1958), 2 U.S. Code Cong. and Adm. News (1958), p. 3909. The amendment was accordingly drafted in the present tense with an eye to the future. In the amendment's terminology, "Such court *is hereby declared to be* a court established under Article III of the Constitution of the United States." No effort was made to rewrite the status of the court prior to 1958 or to say that the court from the time of its conception in 1909 was declared to be an Article III court. And the legislative history cited by

[7] Compare the overt attempt to give retroactive effect to the 1930 legislation conferring good behavior tenure on judges of the Court of Customs and Patent Appeals: "For the purposes of section 260 of the Judicial Code, as amended, (relating to the resignation and retirement of judges of courts of the United States) any service heretofore rendered by any present or former judge of such court, including service rendered prior to March 2, 1929, shall be considered as having been rendered under an appointment to hold office during good behavior." Sec. 646 of Tariff Act of June 17, 1930, c. 497, 46 Stat. 762.

the United States (Br., pp. 68-74) tends only to confirm that conclusion.[8]

In view of that background, the 1958 amendatory legislation can fairly have no impact whatever on the capacity of Judge Jackson to perform Article III functions. The prospective intent and language of the 1958 declaration confine its thrust, if any, to those judges then sitting on the Court of Customs and Patent Appeals or becoming members thereafter. Judge Jackson took with him into retirement in 1952 only those legislative powers he acquired on appointment, and the effort to add to the powers of the court personnel in 1958 came too late.

On the other hand, even if the Government's analysis be accepted and the 1958 amendment be viewed as a *nunc pro tunc* declaration of Article III status, the way is still not clear to investing Judge Jackson with Article III power. The uncontestable fact is that the 1958 amendment was a mere characterization of the Court's status and was not intended to change the nature or functions of the court —a fact conceded by the United States (Br., pp. 67, 74). Yet under the ruling of the *Bakelite* case, 279 U.S. at 459, a mere legislative characterization or declaration of a tribunal's constitutional status is not controlling—an interpretation of the *Bakelite* case which is also conceded

[8] The United States, in attempting to explain away various legislative statements clearly indicating the prospective thrust of the three declarations of Article III status in 1953, 1956 and 1958, is forced to rely on such weak explanations as "must be attributed to oversight" (p. 72, n. 37), "The contexts in which these statements were made reveal that the committee meant that . . ." (p. 73, n. 38), and "merely an imprecise use of language" (p. 74, n. 39). Moreover, the United States concedes (p. 65, n. 33) that its own first reading of the 1958 amendment led it to assume in its brief in opposition to certiorari that the amendment changed the character of the court from a legislative to a constitutional court.

by the United States (Br., p. 106, n. 67). Only this Court, in the exercise of its supreme function of interpreting the Constitution and determining what constitutional article underlies a particular court, can effectively resolve such a matter.

Thus this Court's *Bakelite* decision stands squarely in the way of giving any effect to the 1958 amendatory legislation. Absent some change in the nature, jurisdiction or functions of the court, a statement of Congressional belief as to what constitutional power it was exercising when it created the Court of Customs and Patent Appeals 49 years earlier cannot overrule a definitive resolution to the contrary by this Court.

Nor can it be said (Brief for the United States, p. 60) that the 1958 enactment was an irrevocable renunciation of Congressional power to terminate the tenure or reduce the compensation of the judges of the Court of Customs and Patent Appeals. What Congress has renounced in 1958 it may some day in the future reinstate. Just as Congress cut the salaries of these judges in 1932, so again an economy drive may some day dictate another reduction in salaries. And as Senator Gore has made plain, 99 Cong. Rec. 8944, July 10, 1953, the effectuation of some of the legislative functions of a court such as the Court of Claims or the Court of Customs and Patent Appeals may call for a legislative redesignation "as a legislative court." In short, nothing in the legislative world should be deemed irrevocable.

C. *The request to overrule Bakelite*

Driven by the logic of the facts of history, the United States is forced to ask this Court to overrule the *Bakelite* decision. Only in that manner, presumably, can the judgment rendered against petitioner Benny Lurk be sustained.

Petitioner submits that the constitutional principles and practices surrounding the *Bakelite* decision are too firmly grounded to require or justify reexamination. The distinction between legislative and Article III courts goes all the way back to 1828 to Chief Justice Marshall's declaration in *American Insurance Co.* v. *Canter*, 1 Pet. 511.* And it was in light of that historic distinction that the *Bakelite* determination was made.

Both dangerous and dubious is the assumption made by the United States (Br., pp. 66, 97-98) that this Court in *Bakelite* failed to take into account pertinent historical considerations and "reached an erroneous conclusion on the basis of mistaken premises." Essentially the same historical considerations, although not in the same depth of detail now put forth by the United States, were presented to the *Bakelite* Court by Solicitor General William D. Mitchell and by the petitioner and intervenors in that case. The Court, composed as it was of Justices of such learning and insight as Chief Justice Taft and Justices Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford and Stone, is not lightly to be assumed to have been misled as to the true constitutional nature of the Court of Customs and Patent Appeals. Yet those Justices were unanimous in their firm belief that this court was but "a legislative and not a constitutional court." 279 U.S. at 458.

And just 14 years later, this Court, under the leadership of Chief Justice Hughes and augmented by the presence of Justices Roberts and Cardozo, again canvassed the problem and unanimously concluded that "Further reflec-

* While there was controversy in *Romero* v. *International Terminal Co.*, 358 U.S. 354, as to the meaning of another portion of the opinion in *American Insurance Co.* v. *Canter*, 1 Pet. 511, there was no suggestion that its authority had been, or should be, undermined. See 358 U.S. at 364-365, and 399-402.

tion tends only to confirm the views expressed in the Bakelite Corp. opinion as to the status of the Court of Customs and Patent Appeals, and we feel bound to reaffirm and apply them." *Williams* v. *United States*, 289 U.S. 553, 571. This time, Solicitor General Thomas D. Thacher urged upon the Court the correctness of the *Bakelite* decision.[10]

To overturn such a well-established conclusion so as retroactively to invest a retired judge of the Court of Customs and Patent Appeals with Article III status is a most serious step. Judge Jackson was nominated and confirmed, served on that court for nearly 15 years, and retired therefrom in 1952 on the assumption and understanding of all concerned that he was a legislative court judge who, in Chief Justice Marshall's words, was "incapable of receiving" Article III power. By what principle of law can he now receive in 1961—in his retired status—all the indicia of Article III power during his tenure on the Court of Customs and Patent Appeals? If the *Bakelite* decision is to be overturned, can the impact fairly be applied retroactively? And by what process of osmosis can he suddenly acquire, for purposes of a trial which occurred over a year ago, the essential attributes of Article III power?

The only rational answer is that an overruling of the *Bakelite* doctrine, if this Court so decides, must be prospective in nature. Petitioner is entitled to the benefits of the state of the law at the time of his trial. And at that time, and even now, the law was clear that a judge of the Court of Customs and Patent Appeals possessed no Article III power which entitled him to preside at a criminal

[10] Despite earnest argument by the United States, the Court again refused to reconsider the *Bakelite* and *Williams* doctrines in *Pope* v. *United States*, 323 U.S. 1.

trial in the District Court. By its great insistence on overruling the *Bakelite* case, the Government concedes as much.

Conclusion

For the foregoing reasons, as well as those expressed in petitioner's main brief, the judgment below should be reversed or vacated.

Respectfully submitted,

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May 1, 1961

SUPREME COURT OF THE UNITED STATES

No. 669.—October Term, 1960.

Benny Lurk, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1961.]

Per Curiam.

The judgment of the Court of Appeals is reversed and the case is remanded to that court. *Ellis* v. *United States*, 356 U. S. 674.

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[May 29, 1961.]

Mr. Justice Frankfurter, whom Mr. Justice Harlan and Mr. Justice Stewart join, dissenting.

In my view *Ellis* v. *United States*, 356 U. S. 674, on the basis of which the case is sent back to the Court of Appeals, does not fit the facts and circumstances of this case.

In support of his contention that he was wrongfully denied the right to appeal *in forma pauperis*, petitioner presents for our consideration two grounds for reversal of his conviction of robbery in the United States District Court for the District of Columbia. The first contention, concerning the admission at his trial of allegedly prejudicial evidence, is so lacking in merit as to be plainly frivolous. It would not justify an appeal *in forma pauperis*. But petitioner also raises a jurisdictional question, *viz.*, whether he could constitutionally be tried by a court presided over by a retired judge of the Court of Customs and Patent Appeals. This question, therefore, would have warranted review by the Court of Appeals.

Solution of this problem will call into consideration a number of subsidiary questions. What are the characteristics of an Article III court? Is the Court of Customs and Patent Appeals an Article III court? If so, when did it become such a court? Assuming *arguendo*

that the Court of Customs and Patent Appeals has been an Article III court only since 1958 (when Congress enacted legislation conferring that status), what is the bearing of this fact on the status of a judge who retired from the court prior to that time?

These are not questions on which, with all due respect, a lower court can be of effective assistance to this Court. They do not involve the evaluation of evidence or the application of rules of local law or special familiarity and experience with the materials and the underlying considerations on which judgment must be based. On the contrary, the constitutional history and the cases upon which the decision ultimately must turn are the special concern of this Court. Indeed, the questions posed would be entirely suitable for certification to this Court by a lower appellate court. See 28 U. S. C. § 1254. Cf. *United States* v. *Mayer*, 235 U. S. 55. Furthermore, the administration of justice in the federal courts demands a speedy disposition of this dispute. Until it is settled, assignment of retired judges to help clear dockets in federal courts under a litigious cloud will be hampered by uncertainty.

Nothing could be more obvious than that the Court of Appeals, no matter how it may decide the question now put in its keeping, will have it only temporarily. The inevitable final destination of the case is this Court. Decision here should not be delayed by wastefully time-consuming remand to the Court of Appeals of a question that is already before us.